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No. 86-1857

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

CONTINENTAL BANK INTERNATIONAL,

Appellant,

—against—

CITY OF NEW YORK,
DEPARTMENT OF FINANCE,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS FOR THE STATE OF NEW YORK

APPELLANT'S SUPPLEMENTAL BRIEF IN RESPONSE TO VIEWS OF THE UNITED STATES

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Amended Statement Pursuant to Rule 28.1

Appellant has moved for an order permitting its Amended Rule 28.1 listing to be filed under seal. Copies of the listing are herewith submitted to the Court for its *in camera* review.

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IN THE

Supreme Court of the United States

October Term, 1987

No. 86-1857

CONTINENTAL BANK INTERNATIONAL,

Appellant,

—against—

CITY OF NEW YORK, DEPARTMENT OF FINANCE,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS FOR THE STATE OF NEW YORK

APPELLANT'S SUPPLEMENTAL BRIEF IN RESPONSE TO VIEWS OF THE UNITED STATES

Relying on our prior submissions for all else, we limit this response to new matters raised by the Solicitor General in his brief for the United States.

I.

Section 627 is not contingent legislation and is not "superfluous."

Implicitly rejecting positions taken by appellee and the Court below, the Solicitor General struggles to escape the plain meaning of Section 627 by conjuring up a theory of breathtaking novelty: Section 627, he argues, "seemingly was intended only to insure that Edge [Banks] would be subject to some state tax in the event that they were other-

wise held immune from state taxation under the Supremacy Clause" (S.G. Br. 17, 18). Contending that Edge Banks should not be held "immune from state taxation" under present-day doctrine, he frankly acknowledges that "this reading of Section 627 renders the provision largely superfluous" (*id.* at 17).

1. Understandably, the Solicitor General makes no attempt to show that his view is supported by—or is even consistent with—the statutory language. Section 627 is written in declaratory, unconditional and unqualified terms: An Edge Bank "shall be subject to tax by the State within which its home office is located." Such terms negate any notion that Section 627 is either contingent or "superfluous."

The Solicitor General suggests no reason why Section 627 should not be read in harmony with equivalent provisions of earlier federal banking statutes (*e.g.*, R.S. § 5219), which, without exception, permitted only minimal state taxes and implicitly precluded all others, as this Court had repeatedly held (*see* J.S. 17-18). This Court had considered those statutes in numerous cases without once intimating that their effect was contingent or that they constituted mere surplusage.

2. The Solicitor General's theory rests on a misconception of the "constitutional immunity" doctrine established by *M'Culloch* v. *Maryland,* 4 Wheat. 316 (1819), and its extensive progeny. *See, e.g., First Agricultural Nat'l Bank* v. *State Tax Comm'n,* 392 U.S. 339, 340 (1968). That doctrine has never been thought to limit Congress' power to authorize or prohibit such state taxation as it sees fit. *Baltimore Nat'l Bank* v. *State Tax Comm'n,* 297 U.S. 209, 211-212 (1936); *Federal Land Bank* v. *Bismarck Lumber Co.,* 314 U.S. 95, 102-103 (1941). "Immunity" exists only when Congress is silent; once Congress has spoken, the question is no longer one of "constitutional immunity" but

of statutory construction: state taxation is permissible provided that it is within the scope of the congressional authorization. That is the unmistakable teaching of this Court's decisions. *See, e.g., First Agricultural Nat'l Bank, supra,* 392 U.S. at 341; *Bank of California* v. *Richardson,* 248 U.S. 476, 483 (1919); *Owensboro Nat'l Bank* v. *Owensboro,* 173 U.S. 664, 668 (1899). In the case of the Edge Act, the enactment of Section 627 mooted any question of "constitutional immunity." Thus the supposed contingency that the Solicitor General seeks to attach to Section 627 is, and has always been, non-existent.

3. The legislative history contains nothing at all to support the Solicitor General's theory, and he scarcely pretends otherwise. No member of the 1919 Congress intimated the slightest doubt about the power of Congress to authorize state taxation of Edge Banks. It is true, as the Solicitor General points out (S.G. Br. 9-10), that a few Senators expressed uncertainty whether the states would be entitled to tax Edge Banks *in the absence of* congressional authorization, but those doubts were promptly resolved by adding a provision—repeatedly changed as the legislation proceeded through Congress—expressly authorizing specified forms of state taxation. No one questioned the validity of such a provision, and no one suggested that it was to be contingent on some later judicial decision regarding "constitutional immunity." By the very act of legislating on the subject of state taxation, Congress pre-empted the immunity issue, and there is no evidence that anyone thought otherwise. Thus the legislative history provides no more support for the Solicitor General's contingency theory than does the unequivocal statutory language itself.[1]

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[1] The Solicitor General's assumption that Congress believed the "constitutional immunity" doctrine might somehow preclude state taxation specifically authorized by Congress, even if correct (and it is not), does not explain why Congress would enact legislation that did not express its true purpose.

II.

Without justification, the Solicitor General has disregarded authoritative evidence that Congress intended Section 627 to provide the exclusive rule governing state taxation.

1. It can hardly be doubted that, as members of the House Banking and Currency Committee, the authors of Section 627 were well aware of the long-standing rule, reaffirmed by this Court only a few months earlier in *Bank of California* v. *Richardson*, 248 U.S. 476, 483 (1919), that federal legislation permitting specified state taxation of national banks constituted the "exclusive rule" governing such taxation. *See Owensboro Nat'l Bank* v. *Owensboro*, 173 U.S. 664, 668 (1899). A Congress that wanted to be "doubly sure" that its intentions regarding state taxation of Edge Banks were made clear (S.G. Br. 10, 17) would surely have taken care to frame the authorizing legislation in light of this Court's construction of comparable legislation. The Solicitor General disregards persuasive evidence that it in fact did so (J.S. 15-16).

The intended meaning of Section 627 was given a virtually definitive explanation by Representative Wingo of the House Banking and Currency Committee, which drafted Section 627 to replace a materially different provision in the Senate bill. Representative Wingo said on the floor of the House that "we are going to make these corporations [Edge Banks] and their stock to be taxed exactly in the same manner as national banks and their stocks are taxed" (58 Cong. Rec. 8108 (1919)).[2] He explained the reason

[2] The operative language of Section 627 ("shall be subject to tax by the State within which its home office is located") closely parallels language in the equivalent section of the National Bank Act, R.S. § 5219 (authorizing certain "taxes imposed by authority of the State within which the association is located").

for doing so: "The Supreme Court of the United States and the different courts have interpreted this language. . . . We thought that would save a great deal of controversy" (*ibid.*).

The Solicitor General brushes aside Representative Wingo's statement with the unsubstantiated assertion that it was "probably directed" only to the taxation of Edge Bank *shares* (S.G. Br. 12, n.6). Representative Wingo's own words, however, leave no room for doubt that he was referring not only to Edge Bank shares but to Edge Banks themselves. His statement constitutes powerful evidence that the authors of Section 627 drew a close parallel between the taxation of Edge Banks and the taxation of national banks under statutes that this Court had repeatedly and recently construed. The Solicitor General offers no acceptable reason for not taking Representative Wingo's explanation as authoritative and, indeed, controlling.

2. The Solicitor General instead offers the slippery argument that the Senate's ultimate acceptance of the House substitute (after deletion of a *proviso* relating to taxation of bank shares) means that "the House amendment was not perceived to alter the basic effect of the Senate version" (S.G. Br. 17), and on that dubious premise he claims that the meaning of the House version can be ascertained from certain imprecise remarks made during the Senate floor debate weeks before the House version was even drafted (*ibid.*). Both parts of the argument are in error. First, the Senate's acceptance of the House version does not signify that anyone perceived the "basic effect" of the House and Senate versions to be similar, and clearly they were not—although *neither* version authorized general, unlimited taxation of Edge Banks.[3] Second, it is clear from the context

[3] The bill passed by the Senate authorized the states to tax Edge Banks "the same as member banks of the Federal Reserve System" (58 Cong. Rec. 4969 (1919)). At the time, national banks could

(footnote continued on following page)

that the senatorial comments the Solicitor General relies on (S.G. Br. 17) were addressed solely to whether there was need for any provision at all governing state taxation, not to the particular contents of such a provision.

Thus, the legislative history not only fails to support the Solicitor General's contention, but refutes it.

III.

The FRB's authority to authorize Edge Bank branches is an issue on this appeal because the Court below erroneously held that such authority is lacking.

The Solicitor General notwithstanding (S.G. Br. 18, n.9), the issue whether the Board of Governors of the Federal Reserve System ("FRB" or "Board") is empowered to authorize Edge Bank branches is properly before this Court. The issue is here because the Court below held that Section 615(b) of the Act, which permits branches and agencies abroad with Board approval, impliedly prohibits branches in the United States. That holding was the predicate for the Court's decision that Section 627 does not preclude taxation outside the home-office state. The Court reasoned that in enacting Section 627 Congress could not have intended to confer "immunity" on Edge Bank branches because such branches were unauthorized and therefore "non-

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(footnote continued from preceding page)

not be taxed at all except on their real estate. R.S. § 5219; *Owensboro Nat'l Bank* v. *Owensboro,* 173 U.S. 664, 668 (1899); *Bank of California* v. *Richardson,* 248 U.S. 476, 483 (1919). State-chartered banks, which were also members of the Federal Reserve System, were generally taxed like national banks because of obvious competitive considerations. Senate Comm. on Banking, Housing and Urban Affairs, 92nd Cong., 2d Sess., *Report on State and Local Taxation of Banks,* pp. 380-381 (Comm. Print 1972). The Solicitor General's assertion that state-chartered banks were "fully taxed" (S.G. Br. 11, n.4) is incorrect.

existent" (J.S. at A5). To buttress that conclusion, the Court asserted—incorrectly (*see* J.S. at 13 n.9)—that in 1920 the Board itself so construed Section 615(b)when it barred domestic branches in the original version of Regulation K (J.S. at A2-A3).

Because Section 615(b) has been part of the Edge Act since 1919, and because there has been no subsequent legislation authorizing domestic branches, it is evident that if Section 615(b) prohibited domestic branches in 1919, it still does so today. If the lower Court's reading of Section 615(b) is correct, therefore, the FRB's current regulations permitting such branches are invalid.

The Solicitor General appears to give some credence to the lower Court's holding by claiming that Section 615(b) "plainly *could* have been read as prohibiting, by negative implication, the operation of agencies or branches in the United States" (S.G. Br. 13 (emphasis supplied)).[4] But without analyzing the opinion below or offering any other explanation for his assertion, he simply denies that the Court of Appeals so held (S.G. Br. 18, n.9), and he then proceeds to offer his own view—which he does not claim the lower Court shared—that the FRB's power to authorize domestic branches derives from the International Banking Act of 1978, P.L. 95-369, 92 Stat. 607 (*ibid.*). This view will not bear scrutiny. The 1978 legislation neither authorized domestic branches nor amended Section 615(b); it *did*, however, expressly prohibit the FRB from modifying any restrictions, conditions or limitations that the Edge Act requires. P.L. 95-369, § 3(a), 92 Stat. 608 (1978). Therefore, if Section 615(b) does prohibit domestic branches, as the Court below held, there can be no escape from the con-

[4] The Solicitor General nevertheless concludes, though grudgingly, that the 1919 Congress expected Edge Banks to operate across state lines (S.G. Br. 13-16), and he acknowledges that this conclusion "strengthen[s]" our reading of Section 627 (*id.* at 13).

clusion that the FRB's 1979 regulations, to the extent that they purport to permit such branches, are invalid.[5]

IV.

The home-office state, having the exclusive power of taxation, is entitled to tax the entire income of an Edge Bank, including income attributable to operations elsewhere.

The Solicitor General contends that if the power to tax Edge Banks is limited to the home-office state, that state "might" not be able to tax income attributable to other states because of due-process limitations, with the result that some income may escape taxation altogether (S.G. Br. 19, n.10). He cites no pertinent authority in support of this contention, and he ignores contrary authority that is not only pertinent but very likely controlling.

This Court has long held that the states can tax their own domiciliaries on income earned in other states. *Law-*

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[5] The FRB's authority to allow domestic branching notwithstanding Section 615(b) can hardly be doubted. The Edge Act gives the Board broad powers to prescribe rules and regulations governing virtually every aspect of Edge Banks' affairs. *See, e.g.*, § 615(a). Section 615(b) clearly does not prohibit domestic branches *expressly*; as the Solicitor General recognizes (S.B. Br. 13), any such prohibition would have to be by "negative implication." The FRB, which originally drafted Section 615(b) (J.S. 13, n.10), has never drawn such a "negative implication," for it authorized domestic agencies as early as March 1920, only three months after the statute's enactment, and as the Solicitor General acknowledges (S.G. Br. 16), Section 615(b) "treats branches and agencies alike." Thus the FRB's long-standing administrative construction of Section 615(b) is dispositive. "[W]here a statute is 'silent or ambiguous' with respect to a specific issue, a court should defer to the construction adopted by the agency administering the statute whenever the agency has adopted a 'permissible construction of the statute.' " *Independent Ins. Agents of America, Inc.* v. *Board of Governors of the Federal Reserve System*, 838 F.2d 627, 632 (2d Cir. 1988), quoting *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984).

rence v. *State Tax Comm'n*, 286 U.S. 276 (1932) (business income); *Guaranty Trust Co.* v. *Virginia*, 305 U.S. 19 (1938) (trust income). As the Court said in *Lawrence*, "domicile in itself establishes a basis for taxation." 286 U.S. at 279. Although *Lawrence* and *Guaranty Trust* involved individual rather than corporate taxpayers, it is doubtful that the due process clause confers greater rights on corporations than on natural persons.

At least two state courts have upheld the domiciliary state's right to tax out-of-state income that 15 U.S.C. § 381 shields from taxation elsewhere. *Coors Porcelain Co.* v. *State*, 517 P.2d 838 (Colo. 1973) (*en banc*), *cert. denied*, 419 U.S. 874 (1974); *Deseret Pharmaceutical Co.* v. *State Tax Comm'n*, 579 P.2d 1322 (Utah 1978). *Cf. Central R. Co.* v. *Pennsylvania*, 370 U.S. 607 (1962) (railroad cars having no tax situs elsewhere held subject to ad valorem tax by state of owner's domicile).

There appears to be no sound reason why Edge Banks should not be treated, for tax purposes, as domiciliaries of the states in which they have their home offices. Such treatment seems entirely consistent with the Edge Act's requirement that each Edge Bank have a designated "home office." *See* §§ 613, 622, 625, 627. The home-office state would thus have power to tax an Edge Bank's total income, including income earned outside the home-office state. Accordingly, Section 627 does not confer tax "immunity," nor does it cause any income to escape taxation.

Conclusion

By relying on novel theories markedly different from anything previously raised or considered in this or any other litigation, the Solicitor General has underscored the inappropriateness of summary disposition of this appeal. The decision below is in error, and this appeal presents federal questions that are both substantial and of public importance. Appellee's motion to dismiss or affirm should be denied.

Respectfully submitted,

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